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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 277

MARVIN JOHNNY PERRY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Marvin Johnny Perry, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 16, 1964, in this proceeding.

CITATION TO OPINION BELOW

The original opinion of the Court of Appeals, dated June 16, 1964, has not been reported to date. This opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals is dated June 16, 1964, and was entered on the same date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

1. Whether a federal district court judge, in a criminal case where the issue of entrapment has been raised by the defendant who testified in his own behalf but presented no evidence of his good character or reputation, may charge the jury, over defendant's objection, that evidence of the defendant's record for violation of law may be considered by the jury as it bears on the issue of entrapment without properly limiting the consideration of the defendant's criminal record to his predisposition to commit the crime and his credibility as a witness.

STATEMENT OF THE CASE

History of This Litigation

This case come on for trial in the Raleigh Division of the United States Court of the Eastern District of North Carolina on February 11, 1964, before Honorable Algernon L. Butler, District Judge, and a jury. Jurisdiction of the District Court for the Eastern District of North Carolina was invoked because the petitioner was charged with violations of a Federal Internal Revenue Act. The defendant had been arraigned on May 6, 1963, and entered a plea of not guilty to the charges contained in the information and requested a trial by jury. The criminal information which was filed on May 6, 1963, after the defendant had waived bill of indictment on the same date, contained two

counts, the first count charging that the defendant removed, deposited, and concealed, or was concerned with removing, depositing and concealing 18 gallons of non-tax-paid whisky in violation of Title 26, United States Code, Section 7206 (4) on July 20, 1962, and the second count contained an identical charge except that the date was July 23, 1962, and the amount of non-tax-paid whisky was 30 gallons.

The defendant took the stand and testified as a witness in his own behalf, however, he did not offer any evidence by witnesses or otherwise that his character or general reputation in the community in which he lived was good. Appellant's Appendix pp. 8A-16A. His defense was that he did not commit the crime and as an alternate that he was unlawfully entraped.

At the close of the Government's evidence, the defendant made a motion for judgment of acquittal on the grounds that an entrapment had been established and the Court disallowed the motion.

After the defendant had gone on the stand and testified in his own behalf, no further evidence was presented by either the defendant or the Government, and at the close of all the evidence, the defandant made a motion for judgment of acquittal on the grounds that entrapment had been established as a matter of law, and the motion was disallowed by the Court.

The Court in its charge to the jury charged the jury that the defendant's record and reputation for violations of law might be considered by them as it bears on the issue of entrapment. Appellant's Appendix 16A-17A.

The Court also in its charge stated that the Government contended that the defendant went on the witness

stand as a witness in his own behalf and admitted upon cross-examination numerous convictions for violating the Federal Internal Revenue Laws relating to liquor and the State liquor laws to and including the year 1960 without instructing the jury as to how they should consider this evidence of a prior criminal record in their deliberation. Appellant's Appendix p. 17A.

After the Court had concluded the charge and before the jury had retired, the defendant through his attorneys objected to the charge on the grounds that the Court had mentioned the defendant's criminal record without instructing the jury that they should consider the criminal record of the defendant only on the question of his predisposition to commit the crime and his credibility as a witness and not as to his guilt generally, since he had not put his reputation in evidence except as a witness. Appellant's Appendix pp. 17A-18A.

After a lengthy discussion between the Court and the attorneys for the defendant, the Court refused to explain to the jury as to how they could consider the criminal record of the defendant in their deliberation and refused to instruct the jury to limit their consideration of the defendant's criminal record to the question of his predisposition to commit the crime and his credibility as a witness or to caution them not to consider his record as to his guilt generally, and instead re-instructed the jury that the defendant's record for violation of law might be considered by the jury as it bears on the issue of entrapment again without instructing them as to how it bears upon the issue of entrapment. Appellant's Appendix pp. 18A-20A.

The jury returned a verdict of guilty as charged in both counts of the information and the judge rendered

judgment on February 12, 1964, against the defendant commiting him to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years on count one and three years on count two to run concurrently with the sentence in count one. On the 12th day of February, 1964, the defendant duly entered a notice of appeal from the judgment entered against him, and the sentence imposed, to the Circuit Court of Appeals for the Fourth Circuit.

The Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court stating:

> "Upon analysis and review of the record of the trial court, and carefully weighing arguments of counsel upon call of the case in this court, the opinion of the court is that no errors substantially affecting or prejudicing appellant's rights were committed in the trial."

Rolevant Facts

At the trial, the following relevant facts were established:

The defendant testified that prior to July 20, 1962, he was in the bed asleep after having been up all night with his wife who had a broken leg and a broken arm, and Vance Skipper came up and told him that he wanted whisky. Appellant's Appendix p. 8A.

The defendant further testified that he had gotten out of prison on March 10, 1962, ninety days early on account of his wife's injuries and had been allowed to remain out on account of his wife's injuries and cancer condition for the remaining ninety days of his term. Appellant's Appendix p. 14A.

The defendant further testified that he and Vance Skipper had been in prison together at Smithfield. Appellant's Appendix p. 14A.

The defendant further testified that Vance Skipper attempted to get some whisky from him and that he refused. He reminded him that he had just gotten out of prison for whisky and did not want to have anything to do with it. However, in spite of the defendant's protestation, Vance Skipper insisted that he meet a friend of his called Mac, who turned out to be undercover agent, Calvin J. Powell, and when the defendant would not go out to meet him he brought Powell into the house. Appellant's Appendix p. 8A.

Agent Powell insisted that the defendant help him get some whisky. He pretended to be a man named Mac from just out of the Ivy Bluff Prison, however, the defendant again refused to have anything to do with helping either Vance Skipper or Powell obtain whisky, and they left. Appellant's Appendix pp. 8A, 9A.

The defendant further testified that at a later date Vance Skipper and Agent Powell, known as Mac, were sitting on his front porch about 4:30 or 5:00 o'clock in the afternoon when he returned from his farm work for a Stub Medlin. Skipper and Powell had been there since about three o'clock waiting on him, and the defendant's wife had cooked them a meal, which they had eaten. They greeted him cheerfully and again asked him if he had found anything, and he again reminded them that he was just out of the penitentiary and didn't want to get back. Appellant's Appendix pp. 9A, 10A.

On the second trip Skipper and Powell kept talking about whisky and the defendant kept telling them that

he didn't have any or as he expressed it, "Hadn't found any." Appellant's Appendix p. 10A.

The defendant further testified that Skipper and Powell came back on a third occasion at which time they were drunk and sick. Charles Collie and Powell went out and talked in Powell's car. Then Charles went away saying, "I'll be back in a few minutes." Then Powell, Skipper and the defendant rode down the road and came back and when they got back Charles Collie sold Powell and Skipper three cases of whisky from the boot of a car which was in the yard, and Skipper and Powell left. Appellant's Appendix pp. 10A, 11A.

The undercover agent, Powell, known as Mac, and Skipper again came back on a fourth occasion and after the defendant had again refused to sell him whisky Powell talked with Charles Collie who asked the defendant to ride with Powell and Skipper to a certain meeting place, which he did, and at the meeting place the defendant helped Charles Collie and Vance Skipper and Powell unload the whisky from Charles Collie's car into Agent Powell's car. Agent Powell paid Charles Collie $125.00 and both Powell and Skipper left. Appellant's Appendix pp. 11A, 12A.

The defendant Marvin Johnny Perry, further testified that later Vance Skipper came back by himself and borrowed $150.00 from him on the pretext of helping a friend who was in trouble, and on the next day he came back and borrowed another $10.00 on the pretext that his girl friend was in trouble. Appellant's Appendix pp. 12A, 13A.

The defendant testified that the reason that he helped load the cases of liquor on the second occasion was

just like he loaned Vance Skipper the money; he thought he was helping them. It was just a friendly thing like helping someone load a suitcase in a car if they had asked him to do it. Appellant's Appendix p. 15A.

On cross-examination the defendant testified, and there were no facts to the contrary, that the last offense for which he was convicted was for one committed in 1960 and that this was the term that he was serving when he got out in 1962. Appellant's Appendix p. 16A.

The defendant went upon the stand and admitted violations of the State and Federal liquor laws the last being in the year 1960. Appellee's Appendix pp. 18A-21A.

Undercover agent Calvin J. Powell on direct examination established the dates of the two liquor transactions as July 20, 1962, and July 23, 1962 and stated that Perry sold the liquor on the July 20, 1962 sale on the agent's first trip to Perry's house after some conversation and on agreement on the price of the liquor. He did not even mention Charles Collie as being present on the July 20, 1962 transaction and stated that Marvin Johnny Perry was the only one participating in the sale. However, he substantially testified as to the July 23, 1962 transaction as the same as testified to by the defendant Marvin Johnny Perry, and Powell did not mention any conversation between himself and Collie. Appellee's Appendix pp. 1A-7A.

Agent Powell testified on cross-examination that he went down to Johnny Perry's place, "in an effort to buy some liquor from him." Appellant's Appendix p. 7A.

On cross-examination Powell further testified that both he and Vance Skipper were working for the Government, Appellant's Appendix p. 5A, and that he might have been in charge of Vance Skipper to some degree. Appellant's Appendix pp. 7A, 8A.

On cross-examination Agent Powell testified that he had no explanation why he put in his statement concerning the case, "On our arrival we talked with Perry, who advised us that he had saved three cases of whisky for us as we had requested." Appellant's Appendix p. 4A.

Powell further stated that his statement was made up from his field notes which are made in his own hand writing which he tries to make as accurate as he can, but he still could not remember why he put the above quoted words in his statement when he contended that he had not been there before. Appellant's Appendix pp. 6A, 7A.

On cross-examination Agent Powell further stated that he did not know how many times Vance Skipper had been to Perry's because he had never sent him. Appellant's Appendix pp. 4A, 5A.

Agent Calvin Powell on cross-examination was evasive when questioned about being drunk and vomiting and answered, "It's been a long time ago." Appellant's Appendix p. 6A.

The Government's other agent in this transaction, Vance Skipper did not testify and the Court does not have the benefit of his testimony concerning the facts in this case.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals raises an important and disturbing question of federal law which has not been, but should be, settled by this Court.

In the case of *Sorrels* v. *United States*, 287 U.S. 435 and *Sherman* v. *United States*, 356 U.S. 369, the Court, by a majority decision, held that unless the issue of entrapment can be decided as a matter of law, the issue of whether a defendant has been entraped is for the jury as part of its function of determining the guilt or innocence of the accused. However, this Court did not lay down a guiding rule which will require the trial judge in his charge to the jury to limit evidence of the defendant's criminal record, when not competent upon the question of guilt or innocence generally, to the defendant's ready compliance and predisposition to commit the crime.

In the case of *Michelson* v. *United States*, 335 U.S. 469, the Court clearly laid down the principle that the defendant's criminal record could not be used to establish the probability of his guilt. However, a guiding rule has not been established by this Court that would require the trial judge to limit testimony of a defendant, who took the stand but did not offer evidence of his good character and reputation, to the credibility of the defendant as a witness.

It is respectfully submitted that because of the absence of a guiding rule in the foregoing decisions the Court of Appeals affirmed the judgment of the District Court and in effect decided erroneously that a defendant, who went upon the witness stand but did not put his character and reputation in evidence generally, in a case where entrapment was an issue, was

not entitled to an instruction to the jury by the Court that his criminal record should only be considered as to his predisposition to commit the crime and to his credibility as a witness, though the petitioner through his counsel objected to the charge of the Court and specifically requested such limitations in a lengthy discussion with the trial judge.

It is respectfully submitted that the Court of Appeals has in effect decided a question of federal law which is important not only to this petitioner but other defendants who must take the stand in their defense, and it is important that this Court establish a guiding rule not only for the protection of the petitioner but all defendants with criminal records who take the stand in their own behalf but do not offer evidence of good character and reputation. This rule should be comprehensive enough to apply not only to entrapment cases but to all criminal actions.

The case of *Carson* v. *United States,* 310 F. 2d 558 C.A. 9 at page 561, clearly indicates the course that the Court should have taken upon the objection of the defendant to the charge of entrapment, wherein the Court stated:

> "In addition, since evidence concerning appellant's predisposition to commit offenses is relevant on the question of entrapment, a cautionary instruction advising the jury of the limited purpose of such evidence is appropriate."

It appears to be well established that when a defendant goes upon the stand as a witness in his own behalf only his credibility as a witness is at issue and his character and reputation do not become an issue generally unless the defendant puts his good character

and reputation in issue by calling witnesses to testify thereto. *Michaelson* v. *United States, supra; Greer* v. *United States*, 245 U.S. 559; *United States* v. *Walker*, 313 F. 2d 236 C.A. 6; *United States* v. *Tomaiolo*, 249 F. 2d 683 C.A. 2; *Simpkins* v. *United States*, 78 F. 2d 594, C.A. 4; *United States* v. *Pennix*, 313 F. 2d 524 C.A. 4; *United States* v. *Harris*, 330 F. 2d 185 C.A. 4; *Underhill's Criminal Evidence*, Fifth Edition, Vol. I, Section 192; Wigmore On Evidence, Vol. I, Section 57, Third Edition at page 456, Section 61 at page 464, Section 58 at page 457. Since a defendant by taking the stand does not thereby put his character and reputation in issue generally, unless he has offered evidence of good character and reputation, the cross-examination is limited to an attack on the defendant's character and reputation to test his credibility as a witness and any criminal convictions elicited are competent for that limited purpose only. *United States* v. *Pennix Supra; United States* v. *Harris Supra;* Underhill's Criminal Evidence, Fifth Edition, Vol. I, Section 164 at page 304; Wharton's Criminal Evidence, Vol. III, Twelfth Edition, Section 942 at pages 378-379; Wigmore on Evidence, Third Edition Vol. I, Section 61 at page 464. The jury cannot apply these rules without a proper charge.

The decision of the Court below completely disregarded the petitioner's right to a charge of the court limiting the consideration of his criminal record, and in order to preserve the petitioner's rights which have been disregarded and to decide an important question of federal law which has not been, but should be, settled by this Court, a review of the decision below is a requisite.

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit should issue.

Respectfully submitted.

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July 3, 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9411

UNITED STATES OF AMERICA, *Appellee,*

versus

MARVIN JOHNNY PERRY, *Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH
ALGERNON L. BUTLER, DISTRICT JUDGE

(Argued June 12, 1964 Decided June 16, 1964)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and HEMPHILL, District Judge.

Irvin B. Tucker, Jr., (Hill Yarborough on brief) for Appellant, and John R. Hooten, Assistant United States Attorney, (Robert H. Cowen, United States Attorney, on brief) for Appellee.

PER CURIAM:

Upon analysis and review of the record of the trial court, and carefully weighing arguments of counsel upon call of the case in this court, the opinion of the court is that no errors substantially affecting or prejudicing appellant's rights were committed in the trial.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 277

MARVIN JOHNNY PERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1964. The petition for a writ of certiorari was filed on July 14, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court's instructions sufficiently protected petitioner against improper consideration of evidence relating to his criminal record.

STATEMENT

After a waiver of indictment and a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on two counts of a criminal information charging removal and concealment of non-taxpaid whiskey in violation of 26 U.S.C. 7206(4). He was sentenced to concurrent terms of imprisonment for three years. The court of appeals affirmed (Pet. App. 1a).

An investigator for the Internal Revenue Service testified that, working in an undercover capacity and with a government informer, he went to petitioner's residence upon two occasions in July, 1962, and each time purchased "moonshine" whiskey from petitioner (Tr. 3-11).[1] On cross-examination the investigator denied that he had visited petitioner before the first sale (Tr. 13) or that he had heard petitioner say that he was not going to sell him liquor (Tr. 22). Another agent of the Revenue Service testified that petitioner admitted, in an interview after arrest, that he had sold the liquor (Tr. 37).

Petitioner testified that the investigator and the informer, with whom he had been friendly, had visited his residence three or four times prior to the day that

[1] Record references are to the original transcript of trial proceedings, a copy of which we are lodging herewith.

they received the first quantity of liquor (Tr. 60-62). Even so, petitioner said, it was not he, but his wife's nephew, who sold the whiskey, and that he merely helped load the whiskey on the second occasion (Tr. 54-58). He said that when he was asked about providing whiskey he replied that he would mention the request to anyone he saw who might supply it, but that thereafter he always answered "no" to the inquiry whether he had found a source, adding that he had just been released from the penitentiary (in March 1962) and did not want to go back (Tr. 60, 53-54).

On cross-examination petitioner admitted federal and State convictions involving the manufacture, possession, and sale of illegal whiskey ranging over a period from 1939 to 1961 (Tr. 63-66).

Motions for acquittal on the ground of entrapment were denied at the conclusion of the Government's case and at the close of all the evidence (Tr. 51, 70).

In its charge to the jury the court, after instructing as to the presumption of innocence and the burden of the government to prove guilt beyond a reasonable doubt, said (Tr. 71):

> In this case the defendant has entered a plea of not guilty to each of the charges against him and has thus raised the defense of entrapment. The Court charges you that when the defense of entrapment is raised, the predisposition and criminal design and intent of the defendant become relevant; and the evidence relating to the predisposition of the defendant and his record and reputation for violations of law may be considered by you as it bears on the issue of entrapment.

Thereafter the court reviewed all the evidence relied upon by the parties, reciting, *inter alia*, admissions by petitioner as to his criminal record (Tr. 74-82). After stating that the evidence raised questions of fact to be determined, the court read the two counts of the information and the statute involved, and listed the elements of the crime (Tr. 82-85). It defined entrapment, explaining that the government had the burden of proving beyond a reasonable doubt that the defendant was not unlawfully entrapped (Tr. 85-86) and charging that, even if the jury found that the defendant committed the offenses charged in the information, it would be its duty to find the defendant not guilty if it found that he was unlawfully entrapped (Tr. 87). After a colloquy at the bench, inaudible to the jury, as to the weight to be accorded petitioner's prior record, the court told the jury that counsel had called his attention to the fact that, in his prior instruction on entrapment he had referred to record and reputation, but that there was no evidence as to reputation in this case. He then repeated his instruction as follows (Tr. 91):

> The Court charges you that when the defense of entrapment is raised, the predisposition and criminal design and intent of the defendant becomes relevant; and evidence relating to the predisposition of the defendant and his record for violation of laws may be considered by you as it bears on the issue of entrapment.

ARGUMENT

In view of the fact that both early and at the very last part of his charge, the judge told the jury that

petitioner's prior record might be considered as it bore on the issue of entrapment, it is difficult to understand petitioner's argument that the court did not properly limit the consideration of the defendant's criminal record to his predisposition to commit the crime. It is true that the court, in detailing the government's contentions, included admissions made by petitioner on cross-examination as to his criminal record (see Tr. 80). Before and after this, however, the court instructed that the evidence relating to petitioner's predisposition and record for violations of law was to be considered *on the issue of entrapment*. The jury could not have been confused as to the purpose for which it was to consider the evidence of prior crimes.

The instruction did not suggest that the jury could use the evidence in determining credibility. This was advantageous to petitioner rather than prejudicial.

It is also true that the court in a bench conference indicated that he thought the evidence of petitioner's criminal record was general evidence which could be considered as substantive evidence on the question of guilt or innocence (Tr. 89-90). This colloquy was inaudible to the jury however (Tr. 88), and the court's actual instructions expressed a contrary view.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1964.

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